In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00475-CV

JAMES G. GORDON, Appellant

V.

STEVEN H. CLEMONS, JENNY L. MARTINEZ, WHITNEY BOWLING, LEGGETT & CLEMONS, P.L.L.C., GODWIN PAPPAS RONQUILLO, L.L.P., AND PHILLIP W. OFFILL, JR., Appellees

---

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 08-01-00941 CV

MEMORANDUM OPINION

James G. Gordon ("Greg Gordon") appeals the summary judgment granted in favor of Steven H. Clemons, Jenny L. Martinez, Whitney Bowling, Leggett & Clemons, P.L.L.C. (collectively "L&C"), Godwin Pappas Ronquillo, L.L.P. ("the Godwin Firm"), and Phillip W. Offill, Jr. The appellees are the lawyers and law firms that represented Greg Gordon's opponents in separate lawsuits concerning disputes over ownership, control, and corporate governance of SGD Holdings, Ltd. ("SGD"). Greg Gordon's pleadings and the summary judgment record establish a limitations bar for all claims

against one group of lawyers and their firm. Greg Gordon failed to raise a fact issue regarding his claims against the other lawyer and his firm. Accordingly, we affirm the trial court's judgment.

This Court affirmed the trial court's judgment in part and reversed and remanded in part for a new trial in related litigation between Greg Gordon and his brother, George David Gordon, Jr. ("David Gordon"). *Gordon v. Gordon*, No. 09-05-330 CV, 2006 WL 5961831 (Tex. App.--Beaumont July 31, 2008, pet. denied). In *Gordon v. Gordon*, Greg Gordon and his wife sued David Gordon and SGD for damages arising out of the merger of Greg's and Lisa's family business, Con-Tex Silver Imports, Inc. ("Con-Tex") with the publicly-traded SGD, and Greg Gordon's subsequent expulsion from SGD following a dispute concerning SEC filings. *Id.* at **1-2. A bench trial resulted in a take nothing judgment. *Id.* at *1. On appeal, this Court held that factually sufficient evidence supported the trial court's findings that the Gordons failed to prove the existence of an attorney-client relationship or formal fiduciary relationship between the Gordons and David Gordon as SGD's corporate and securities counsel. *Id.* at **5-7. But we also held that the overwhelming weight and preponderance of the evidence supported the Gordons' claim of a confidential relationship giving rise to an informal fiduciary duty owed to them by David Gordon, and we reversed the judgment and remanded the case to the trial court on that ground. *Id.* at *10.

In the case now before us, Greg Gordon alleged that L&C acted as general counsel for SGD while Greg Gordon was the majority shareholder and sole legitimate director of SGD. Greg Gordon further alleged that beginning in 2002, L&C engaged in a continuing scheme with David Gordon to wrest control and ownership of SGD from Greg Gordon. According to Greg Gordon, the defendants were aware that he was the only legitimate director of SGD but, while acting as general counsel for SGD, L&C acted to remove Greg Gordon as President of SGD and filed lawsuits against him. Greg Gordon asserted claims against L&C for breach of fiduciary duty, fraud, fraudulent concealment, and civil conspiracy.

Greg Gordon alleged that in May 2003, as part of a scheme with David Gordon, Offill and the Godwin Firm filed a lawsuit for fraud and breach of fiduciary duty on behalf of Lakewood Development Corporation ("Lakewood") against Greg Gordon and SGD. Greg Gordon alleged that the Lakewood suit was dismissed for want of prosecution in August 2007 and that the suit was frivolous and filed maliciously as part of a scheme to defraud Greg Gordon. Greg Gordon asserted claims against Offill and the Godwin Firm for malicious prosecution. He also alleged that all of the defendants engaged in an unlawful conspiracy with David Gordon "for the purpose and object of destroying" Greg Gordon and SGD.

L&C's answer raised the affirmative defense of limitations, and L&C moved for summary judgment on its limitations defense. The trial court initially denied the motion

for summary judgment and granted L&C's special exceptions, but granted the summary judgment on reconsideration after Greg Gordon amended his pleadings.

Offill and the Godwin Firm moved for summary judgment on the grounds that as a matter of law Greg Gordon could not maintain a suit for malicious prosecution against counsel of record for the opposing party in litigation. Offill and the Godwin Firm also moved for summary judgment on the ground of no evidence of four of the elements of Greg Gordon's malicious prosecution claim. The trial court initially denied the motion for summary judgment and granted Offill's and the Godwin Firm's special exceptions. After Greg Gordon amended his pleadings, the Godwin Firm adopted the motion for reconsideration filed by L&C, and the trial court granted summary judgment in favor of the Godwin Firm.

Offill did not appear for the pre-trial hearing or trial and the trial court entered a default judgment for Greg Gordon. Offill moved for new trial on grounds that he did not receive notice of the setting. After the trial court granted Offill's motion for new trial and set aside the default judgment, Offill filed a motion for summary judgment on the ground that as a matter of law, Greg Gordon could not maintain a suit for malicious prosecution against counsel of record for the opposing party in litigation, and on the ground that there was no evidence of any of the elements of malicious prosecution, fraud, or conspiracy. The trial court granted Offill's motion for summary judgment.

We address the issues raised in this appeal under the familiar standards established for appellate review of summary judgments. A no-evidence motion for summary judgment "is essentially a motion for a pretrial directed verdict." *Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 581 (Tex. 2006). To avoid summary judgment, the nonmovant must produce more than a scintilla of evidence to defeat the elements specified in the motion. *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600 (Tex.2004); *see* TEX. R. CIV. P. 166a(i). "We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Tamez,* 206 S.W.3d at 582. If the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions regarding an essential element challenged by the no-evidence motion, the nonmovant has met his burden under Rule 166a(i). *Ridgway,* 135 S.W.3d at 601. "To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. Evidence that is so slight as to make any inference a guess is in legal effect no evidence." *Id.*

In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). "We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary

judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true." *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). Moreover, "a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response." *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993).

Issue one contends that Greg Gordon's claims against L&C are not barred by limitations and that consequently the trial court erred in granting L&C's motion for summary judgment. L&C moved for summary judgment on the grounds that as a matter of law, Greg Gordon's claims against L&C accrued more than four years before suit commenced. Greg Gordon filed this suit against L&C on January 25, 2008. An affidavit by Clemons asserted that L&C was hired to represent SGD in connection with corporate governance issues and David Gordon continued to represent SGD as securities counsel. According to Clemons, Greg Gordon was represented by Robert Gordon after the November 25, 2002, meeting that resulted in Greg Gordon's ouster from the company.

On December 13, 2002, L&C filed *SGD Holdings, Ltd. v. James G. Gordon,* in which SGD alleged that Greg Gordon improperly diverted corporate funds. Clemons and Martinez represented SGD in that suit and defended SGD in *Gordon v. Gordon,* which Greg Gordon filed on January 2, 2003. L&C represented SGD until sometime in August 2004, when all representation of SGD by L&C ceased. According to Clemons, Bowling never performed any work for SGD.

A cause of action generally accrues "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *S.V. v. R.V.,* 933 S.W.2d 1, 4 (Tex. 1996). Greg Gordon asserted claims against L&C for breach of fiduciary duty, fraud, fraudulent concealment, and civil conspiracy. In his amended petition, Greg Gordon alleged that

> [t]he termination and removal of Plaintiff was based on an illegal unauthorized board meeting, excluding Plaintiff from the meeting based on the false representations that Plaintiff's Seventy-five Million shares of SGD were no longer his. This was false and fraudulent as evidenced by the judicial determination by a federal bankruptcy judge in the SGD bankruptcy in May 2005 that Plaintiff was since 1999 the holder of those shares.

The amended petition alleged that the meeting occurred on November 25, 2002. Greg Gordon alleged that L&G had a special relationship to him because he was the majority shareholder of SGD. Thus, Greg Gordon alleged that a breach of fiduciary duty by L&C occurred on November 25, 2002. Likewise, Greg Gordon alleged that the "conspiracy to wrestle control and ownership of SGD from Plaintiff and to retaliate against Plaintiff by

and through the direction of others namely, David Gordon and Terry Washburn" began in 2002. According to the allegations in the amended petition, the fraud occurred when L&C continued to misrepresent who SGD's directors were at subsequent board meetings. This suit commenced in 2008, more than four years after his ouster as President and director caused a legal injury to Greg Gordon.

As to each of his claims against L&C, Greg Gordon's own pleadings identify the first date on which a legal injury occurred as a date that is more than four years before he filed this lawsuit. Assuming the existence of a fiduciary duty for purposes of an analysis of the limitations issue, Greg Gordon's claim accrued no later than the date on which the fact of the fiduciary's misconduct became apparent. *See S.V.*, 933 S.W.2d at 8. In his response to the motion for summary judgment, Greg Gordon submitted an affidavit that states that he told Clemons that the purported directors were not duly elected directors, but Clemons continued to serve at the request of the invalid directors. For purposes of a claim for conspiracy, Greg Gordon was aware of David Gordon's misconduct as well as L&C's alleged misconduct, because Greg Gordon filed a suit against David Gordon on January 2, 2003. The allegations the Gordons brought in that suit included a claim that Bowling met with David Covey, one of the *Gordon v. Gordon* defendants, and conspired with David Gordon, Washburn, and Horowitz to remove Greg Gordon as an officer and director of Con-Tex. Greg Gordon's fraud claims arise from L&C's continued representation of SGD through its allegedly illegally constituted board of directors. Thus,

a legal injury occurred and was apparent to Greg Gordon more than four years before he sued L&C.

Greg Gordon argues that his cause of action accrued when the judge presiding in SGD's bankruptcy proceedings ruled that Greg Gordon was the legal owner of seventy-five million shares of stock in SGD. He also argues that SGD's bankruptcy tolled limitations on his claims against L&C. Thus, he contends, limitations began to run in May 2005. No authority is cited to support this argument. The filing of a bankruptcy automatically stays actions against the debtor. 11 U.S.C.A. § 362(a) (West 2004 & Supp. 2010). An automatic stay tolls limitations for a civil action in a nonbankruptcy court on a claim against the bankruptcy debtor. 11 U.S.C.A. § 108(c) (West 2004 & Supp. 2010). The claims being brought in this suit are not against the bankruptcy debtor, SGD; therefore, the bankruptcy code does not operate to toll limitations on Greg Gordon's claims against L&C. Moreover, Greg Gordon does not explain why the occurrence of a legal injury in this case required a prior judicial determination of stock ownership. The trial court did not err in granting summary judgment for L&C on the limitations defense. We overrule issue one. Because the trial court was authorized to enter a take-nothing judgment on all of Greg Gordon's claims against L&C, we do not reach the alternative grounds for summary judgment that have been challenged in issues two and three.

Issue five contends the trial court erred in granting the Godwin Firm's no-evidence motion for summary judgment on Greg Gordon's malicious prosecution claim. The

elements of a malicious prosecution claim are: "(1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages." *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex. 1996). The Godwin Firm moved for summary judgment on the grounds that Greg Gordon had no evidence of the last four of these six elements.

The special injury threshold for damages requires interference with the plaintiff's person or property in the maliciously-brought suit. *Green*, 921 S.W.2d at 206. The mere filing of a lawsuit cannot satisfy the special injury requirement. *Id.* at 208-09. To meet the threshold requirement, "[t]here must be some physical interference with a party's person or property in the form of an arrest, attachment, injunction, or sequestration." *Id.* at 209.

On appeal, Greg Gordon contends that he pled sufficient facts to give notice to the Godwin Firm of his special injury and damages. To defeat the no-evidence motion for summary judgment, Greg Gordon must have produced more than a scintilla of evidence that he sustained special damages. *See* TEX. R. CIV. P. 166a(i). On appeal, Greg Gordon does not identify the summary judgment evidence that raises a genuine issue of material fact on the element of special damages. His response to the motion for summary judgment suggested that the Lakewood litigation interfered with his property rights in

SGD. Greg Gordon attached an affidavit to his response to the motion for summary judgment. The affidavit states that in its prosecution of the Lakewood suit, the Godwin Firm caused him special injury

> by the denial of access to shares I rightfully owned preventing me from my rights as a director and shareholder of SGD and by filing yet another lawsuit against me destroying SGD. SGD ended up in bankruptcy thereby losing the opportunity to develop the corporation and the shell of SGD was sold by the trustee. My damages are the loss of my business, the value of the stock in SGD as well as the denial of my right to direct and give input into the direction of SGD to make it the viable company it was prior to the actions and conduct of all of the defendants named in the lawsuit.

The Lakewood suit was a suit for damages, not an involuntary bankruptcy proceeding. In that litigation Lakewood neither sought to enjoin Greg Gordon from serving on the board of SGD nor employed judicial process to seize or attach Greg Gordon's stock certificate. Evidently, the appellant asserts that by filing the suit on behalf of Lakewood and in conspiracy with David Gordon, the Godwin Firm caused special injury to Greg Gordon by causing SGD to go bankrupt.

Activities related to a lawsuit but not occurring in the lawsuit itself cannot satisfy the special injury requirement. *See, e.g., Providian Nat'l Bank v. Ebarb,* 180 S.W.3d 898, 900 (Tex. App.--Beaumont 2005, no pet.) (Reporting an alleged debt to credit reporting agencies provided no evidence of interference with person or property in a lawsuit.). Even process within a lawsuit will not satisfy the special injury requirement if the process is directed against a third party. *See Green,* 921 S.W.2d at 209-10 (Seller of cattle could not pursue malicious prosecution claim where temporary injunction halting

future cattle sales and requiring deposit of sales proceeds into registry of court had issued against buyer of cattle.). Greg Gordon produced no summary judgment evidence that the lawsuit filed by the Godwin Firm caused special damages to him. Accordingly, the trial court did not err in granting the Godwin Firm's motion for summary judgment. Issue four and the remaining arguments under issue five also address the malicious prosecution claim against the Godwin Firm; therefore, we do not reach those alternative grounds for summary judgment. We overrule issue five.

Issue six contends the trial court erred in granting Offill's motion for new trial and setting aside the default judgment without first conducting an evidentiary hearing. Greg Gordon argues that setting an evidentiary hearing on a motion for new trial is not a discretionary matter. An evidentiary hearing on a motion for new trial is required if the affidavits attached to the motion for new trial have been controverted. *See Estate of Pollock v. McMurrey*, 858 S.W.2d 388, 391-92 (Tex. 1993) (trial court erred in considering motion for new trial on controverting affidavits); s*ee also* TEX. R. CIV. P. 324(b)(1). Greg Gordon did not file a response to Offill's motion for new trial.

Greg Gordon claims that he did not have an opportunity to controvert Offill's motion for new trial because the trial court granted the motion for new trial without the motion having been set for submission. On June 2, 2009, Offill filed a written request for an oral hearing on his motion for new trial, but the trial court did not schedule a hearing. Offill contemporaneously filed a notice of submission. The notice states that the motion

for new trial has been set for submission on Friday, June 12, 2009, at 9:00 a.m. The trial court signed the order granting a new trial on June 24, 2009. Greg Gordon contends the notice of submission is for Offill's motion for an oral hearing, but the notice of submission clearly identifies the motion for new trial as the motion under consideration. Thus, Greg Gordon's assertion that he was not provided with an opportunity to file a response is not supported by the record.

Furthermore, Greg Gordon did not raise the need for an evidentiary hearing in the trial court. The trial court may reconsider an order granting a new trial at any time while the case is still pending. *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 228 (Tex. 2008). Greg Gordon could have filed a motion to reconsider granting the motion for new trial, and he could have identified the controverting evidence that he wanted the trial court to consider in that motion. He did not file such a motion, however, and neither the trial court nor this Court were apprised of the nature of the evidence that would have been presented by Greg Gordon if the trial court had conducted an oral hearing on Offill's motion for new trial. Greg Gordon failed to establish an abuse of discretion; accordingly, we overrule issue six.

The final issue contends the trial court erred in granting Offill's motion for summary judgment. Greg Gordon contends that the trial court erred in granting the no-evidence motion for summary judgment without allowing adequate time for discovery. *See* TEX. R. CIV. P. 166a(i). The case commenced on January 23, 2008, and the trial

court granted Offill's motion for summary judgment on September 22, 2009. In his summary judgment response, Greg Gordon mentioned that discovery he sent to Offill had been returned, and that the other defendants had obtained orders protecting them from discovery, but Greg Gordon neither requested additional time to conduct discovery before submitting the motion for summary judgment nor requested relief from the protective order. Moreover, the proposed order freezing discovery on the Godwin Firm was not signed, and Greg Gordon has not provided this Court with a record reference where a signed protective order may be found. Absent the filing of an affidavit explaining Greg Gordon's need for additional time to conduct discovery, the trial court did not abuse its discretion by ruling on the motion for summary judgment when it did. *See Davis v. West*, No. 01-08-01006-CV, 2009 WL 5174184, at *10 (Tex. App.--Houston [1st Dist.] Dec. 31, 2009, no pet.) (not yet released for publication).

Like the Godwin Firm, Offill also challenged the special damages element of Greg Gordon's claim for malicious prosecution in a no-evidence motion for summary judgment.[1] *See Green*, 921 S.W.2d at 208; TEX. R. CIV. P. 166a(i). The special injury threshold for damages requires interference with the plaintiff's person or property in the maliciously-brought suit. *Green*, 921 S.W.2d at 206. To maintain a suit for malicious

[1]Although we do not reach every ground for summary judgment in this appeal, Offill's 166a(i) motion for summary judgment challenges every element of each of Greg Gordon's claims against Offill. Greg Gordon has not presented arguments specifically seeking a reversal of the trial court's judgment on a fraud claim against either Godwin Firm or Offill.

prosecution, "[t]here must be some physical interference with a party's person or property in the form of an arrest, attachment, injunction, or sequestration." *Id.* at 209.

On appeal, Greg Gordon concedes that the Lakewood lawsuit sought only damages, but he argues that "the true effect of the case was to deprive Gordon of his property interest in SGD, despite the fact that such a recovery could not be had in the [Lakewood] lawsuit." The affidavit Greg Gordon filed in response to Offill's motion for summary judgment addresses the special damages element of his malicious prosecution claim with language that is identical to the language contained in the affidavit he filed in response to the Godwin Firm's motion for summary judgment. Greg Gordon contends that Offill caused SGD to go bankrupt by filing the suit on behalf of Lakewood, but the summary judgment record contains no evidence that any physical interference with Greg Gordon's person or property occurred in the Lakewood suit, as is required to maintain a suit for malicious prosecution. *See id.* Because Greg Gordon failed to produce more than a scintilla of evidence that he sustained special damages, the trial court did not err in granting summary judgment for Offill on Greg Gordon's malicious prosecution claim. *See* TEX. R. CIV. P. 166a(i).

Greg Gordon also contends that he met his summary judgment burden regarding the elements of conspiracy. "An actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). "The

essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Id.* An action for conspiracy depends upon participation in some underlying tort. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). On appeal, Greg Gordon contends Offill engaged in a conspiracy with David Gordon to engage in malicious prosecution.

To be held liable in an action for conspiracy, the defendant need not have actually committed the underlying intentional tort. *See Metzger v. Sebek*, 892 S.W.2d 20, 43-44 (Tex. App.--Houston [1st Dist.] 1994, writ denied); *Bernstein v. Portland Sav. & Loan Ass'n,* 850 S.W.2d 694, 709, 714 n.12 (Tex. App.--Corpus Christi 1993, writ denied), *overruled on other grounds by Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). But the defendant must intend to commit an intentional tort. *See Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719-20 (Tex. 1995). "[I]f an act by one person cannot give rise to a cause of action, then the same act cannot give rise to a cause of action if done pursuant to an agreement between several persons." *Schoellkopf v. Pledger*, 778 S.W.2d 897, 900 (Tex. App.--Dallas 1989, writ denied). Thus, if the underlying act is not an intentional tort, the conspiracy claim must fail. *See Graham v. Mary Kay, Inc.*, 25 S.W.3d 749, 756 (Tex. App.--Houston [14th Dist.] 2000, pet. denied).

The appellant's argument under this sub-issue contains no record references or citations to authorities. *See* TEX. R. APP. P. 38.1(i). The statement of facts contained in

his brief states that a conspiracy to commit malicious prosecution is established by a March 2006 e-mail from Offill to Mark White (Lakewood's President) and David Gordon. In the e-mail, Offill refers to the motion to dismiss for want of prosecution filed by Greg Gordon in the Lakewood suit. Offill explains that he will be filing a motion to withdraw as counsel for Lakewood, mentions that he had a telephone conversation with David Gordon at White's instruction, and states that he will delay filing the motion to withdraw until the next week. Offill goes on to state that "David has advised me that he wants Lakewood to continue prosecution of this matter and will promptly arrange for substitute counsel."

David Gordon had been securities counsel for SDG, the co-defendant in Lakewood's suit against Greg Gordon; therefore, collusion between the plaintiff and one of the defendants in the Lakewood suit could be inferred from David Gordon's involvement in obtaining substitute counsel for Lakewood in the Lakewood suit. Offill filed the suit against Greg Gordon in his capacity as counsel of record for Lakewood. Assuming the March 2006 e-mail establishes a fact issue regarding the existence of a conspiracy between Offill and David Gordon, Greg Gordon's conspiracy claim is still dependent upon his malicious prosecution claim. *See Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 582-83 (Tex. 2001) (Trial court's summary judgment on fraud claims necessarily disposed of dependent conspiracy claim.). Because the Lakewood suit was a suit for damages that did not seek to physically interfere with Greg

Gordon's person or property, Offill's action in filing the Lakewood lawsuit did not establish the intentional tort of malicious prosecution. *See Green,* 921 S.W.2d at 209. Appellant's claim is premised on the alleged malicious prosecution. *See Ernst & Young,* 51 S.W.3d at 582-83. Because Greg Gordon failed to establish a fact issue regarding Offill's participation in the underlying tort of malicious prosecution, the trial court did not err in granting summary judgment for Offill. We overrule issue seven and affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on August 30, 2010
Opinion Delivered September 9, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.